

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Reexamination of the Policy
Statement on Comparative
Broadcast Hearings

) GC Docket No. 92-52
)
)
)
)

RECEIVED

JUL 25 1994

To: The Commission

COMMENTS OF BECHTEL & COLE, CHARTERED

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

We submit the following comments in response to the
Commission's second further notice of proposed rulemaking:

1. On-site management by owners. The Commission should get rid of the notion that full time day-to-day management of a broadcast facility by the owner is required in order to receive credit for the proposed ownership-management structure. This, in effect, says that "mom and pop" ownership-management of a business is so superior to the "corporate America" style of ownership-management of a business (ownership oversight of paid professionals) that "mom and pop" ownership-management evidence is accepted and "corporate America" ownership evidence is rejected. This makes no sense, has never been proven in practice and is one of the grounds for the Court's decision in Bechtel v. FCC. 10 F.2d 875 (D.C.Cir. 1993). Evidence of the "corporate America" style of ownership-management should be accorded no less weight than evidence of "mom and pop" style ownership-management.

2. Two-tiered ownership structures. The Commission should get rid of the distinction between voting and nonvoting ownership interests. This distinction, which stemmed in large measure from

No. of Copies rec'd
List A B C D E

0 + 14

the Anax decision,¹ has done far more harm than any good it may have achieved. It has spawned literally hundreds of unbelievable and unworkable integration scenarios that have glutted the hearing cases over the past decade and more. The number of instances in which a two-tiered structure has, in fact, led to the successful funding and long-term operation of a broadcast station by a minority owner -- if any such instances exist at all -- can probably be counted on the fingers of one hand, and for sure did not surface in the Bechtel litigation, other similar litigation² and previous rounds of comments in this rulemaking proceeding.

3. Comparative applications by professional broadcasters.

The Commission should encourage, not discourage, professional broadcasters to file comparative applications for broadcast permits. In today's high-tech broadcast environment, it is irrational to believe that a person who is not a professional broadcaster can successfully manage his or her own broadcast station and survive, let alone provide a superior program service in the public interest that would be provided by a professional broadcaster. To the contrary, in today's high-tech broadcast environment, the award of permits to professional broadcasters is more likely to result in program service in the public interest and that the award of the permit to nonbroadcasters, particularly

¹ Anax Broadcasting, Inc., 87 FCC2d 483 (Commission 1981).

² Georgia Public Telecommunications Commission, MM Docket No. 89-337, et al (Roswell, Georgia), and Madalina Broadcasting, Inc., MM Docket No. 91-100, et al (Haltom City, Texas).

if they insist on running the broadcast stations themselves. Again, the number of instances where there was a success story involving such a neophyte broadcast owner-manager -- if there exist any at all -- can probably be counted on the fingers of one hand.

4. Several things should be should be done on this score. For one thing, an owner who plans to hire a professional manager and give entrepreneurial oversight of station operations should be credited, not penalized, for such a proposal. For another thing, a strong comparative preference should be granted to a professional broadcaster instead of the historical minor preference for broadcast experience which rarely has been the decisional factor. Still another thing is to get rid of the diversity demerit except in the most egregious situations, such as other broadcast interests in the same community which does not have a substantial number of local broadcast outlets. In today's world with a plethora of broadcast stations, wired and wireless cable, satellite-to-home communications, PCS and Lord knows what else on the horizon, there is no earthly reason to penalize, for example, a professional broadcaster who applies for a new station in Washington, D.C. just because he or she might also own an existing station in Richmond, Virginia down the road, both communities having a substantial number of broadcast outlets.

5. Broadcast record. The broadcast record of an applicant should be given major comparative consideration. Actions speak louder than words. By one's deeds shall you know him.

Professional broadcasters have track records of performance. Good track records lend confidence that the public interest would be served by awarding a new permit to the persons who compiled such records. The longer the record of program service in the public interest, the stronger the preference should be. Bad track records are evidence to the contrary, and should tell the Commission to consider some other applicant. Either way, the established track records are a vastly better tool to determine how the parties will serve the public interest than reliance on the paper proposals of parties who have no broadcast track records at all. In this paragraph, we have not used "broadcast record" in the narrow sense which has been used by the Commission in comparative broadcast rulings. We refer to a party's entire record as a professional broadcaster, whether that be as a licensee or an employee of a licensee.

6. Comparative coverage. As a general rule, comparative coverage advantages should outweigh ownership-management advantages. There are two reasons for this. First, comparative coverage can be supervised and controlled by the Commission. If a party wins on comparative coverage, and then wants to change its coverage, it must apply to the Commission and the Commission has advance knowledge of that change, with the means to protect its processes and the public interest from deception and a failure to carry out its public interest decision in awarding the construction permit. In the case of ownership-management, changes, subtle or otherwise, can take place within the inner

workings of the licensee entity which the Commission may never have knowledge of and which is inherently difficult to monitor and police.

7. Second, comparative coverage is permanent. The initial ownership-management structure, in the overall scheme of things, is usually ephemeral. Consider as an illustration the allocation of 630 kilocycles on the AM band to what is now radio station WMAL in 1925, which has staked the service area of that station to the opportunity to receive service for the past 69 years, irrespective of the ownership, management or program format that may have been in place at any point in time. If the FCC in 1925 had favored one applicant over another because of its ownership-management structure, in the normal case (in today's world at least), this probably would have been history before Commerce Secretary Hoover become President in 1928. On the other hand, if the FCC in 1925 had favored one applicant over another because of its comparative coverage advantage, that decision would have yielded a public interest legacy of greater signal coverage lasting 69 years to date, and still counting. Only the strongest ownership-management showing based on a compelling track record of public interest program service over an unusually long period of time should outweigh the long-term effects of a substantial comparative signal differential.

8. Procedure for pending cases where integration factor was not challenged. Where no party to a currently pending comparative case challenged the integration criterion as

arbitrary and capricious for the exclusion of evidence of ownership-management evidence that was not within the confines of the "mom and pop" integration criterion, it is probably lawful and fair game to change the comparative ground rules and permit applicants to amend their applications within reason. For example, applicants in such pending cases might be permitted to change their ownership structure to eliminate the distinction between voting and nonvoting interests, modify management roles of persons with ownership interests, rely on hired professional employees rather management by neophyte owners, change divestiture commitments if diversity demerits are eliminated, and the like. However, such parties should not be permitted to change the identity of the owners or their respective equity shares, nor to change their signal coverage proposals which were established with the knowledge that their coverage proposals would be an important part of the comparative evaluation.

9. Procedure in cases where a party has challenged the integration criterion. When a party to an existing comparative proceeding has challenged the integration criterion, his or her opponents should not be granted liberties to reform their applications. All applicants in those comparative proceedings are parties to a case in which a legal issue has now been won by one of the parties and has now been lost by the other parties. There is no unfairness in this. That is the legal system. See, e.g., SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) (upholding the retroactive application of a changed SEC rule as serving the

paramount public interest of securities regulation against the loss of opportunities to earn profits and gain control of a corporation); NLRB v. Bell Aerospace Co., 416 U.S. 267, 264 (1974) (upholding change in NLRB policy occurring during an administrative adjudication, applying the new policy to the parties to that adjudication who had relied upon the previous policy); Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C.Cir. 1987) (upholding FCC determination to change comparative factors in hearings for cellular licenses and applying the changed factors to parties that had filed applications based upon former comparative factors); Clark-Cowlitz Joint Operating Authority v. FERC, 826 F.2d 1074 (D.C.Cir. 1987) (approving retroactive change of preferences in comparative proceedings for licenses to operate hydroelectric power plants).

10. The case in the District of Columbia circuit that provides the framework for determining the retroactive application of new law established in adjudications is Retail, Wholesale & Department Store Union v. NLRB, 466 F.2d 380 (D.C.Cir. 1972), which involved a change in an NLRB policy (concerning reinstatement rights of strikers) that had been decided in another adjudication. In that other adjudication (in which this policy change was made), there was no question about application of the changed policy to the parties to that case -- the decision had been made in the circumstances of the case, and the litigants were bound thereby in the normal course. Laidlaw Corporation v. NLRB, 414 F.2d 99 (7th Cir. 1969), cert den., 397

U.S. 920 (1970). Before the Court in Retail was the question of whether the changed policy decided in Laidlaw should be applied retroactively to other cases where the all of the parties had acted in reliance on the previous policy. The Court enunciated a five part standard, involving the equities of the parties, the circumstances of the changed policy and the objectives to be achieved under the policy change.

12. More pertinent to the instant point, the Court drew a distinction between application of the changed policy to the parties to the litigation in which the policy was changed (as in Laidlaw and here) and subsequent application of the changed policy to other cases as a byproduct or result of the initial litigation (as in Retail). With regard to the initial litigation (as in Laidlaw and here) the Court stated:

The Supreme Court has identified a number of reasons calling for application of a new rule to parties to the adjudicatory proceeding in which it is first announced - reasons which do not apply with the same force to subsequent proceedings. Thus, the Court has suggested that to deny the benefits of a change in the law to the very parties whose efforts were largely responsible for bringing it about might have adverse effects on the incentive of litigants to advance new theories or to challenge outworn doctrines. The Court has also made reference to "sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies."³

13. While the decisions just cited involved the lead case

³ Citing Stovall v. Denno, 388 U.S. 293 (1967), in which the Supreme Court applied the new law to the parties to the case in which the new law was developed, stating that otherwise the purely prospective application of the new law would render the decision mere "dictum" in the case at bar. 338 U.S. at 301.

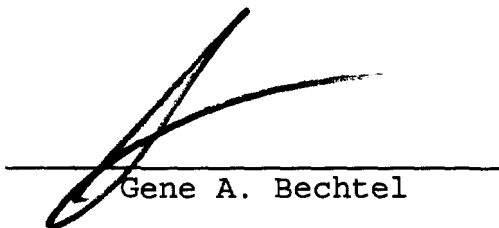
in which the new law was established, there is no reason in law or rationale why the same result should not be applied in other, companion cases where the same pioneering effort to establish the new law was also being made and where the opposing parties were aware of that effort and had full opportunity to oppose it.

14. In Clark-Cowlitz, supra, the majority of the District of Columbia Court of Appeals (decided en banc, Circuit Judges Mikva, Robinson and Edwards dissenting) applied the five part test under Retail analysis to the litigants in the case which had decided the new law. If that were done with regard to either Mrs. Bechtel in the Bechtel case or other companion cases in which the pioneering attack on the integration criterion was made, such parties advocating the new law would still be favored against their opponents -- as was the party establishing new law in Clark-Cowlitz. As was also true in Clark-Cowlitz, the opponents of the party establishing new law should have no opportunity to reform or retry their cases.

15. The first part of the test under Retail is whether the case is one of first impression. This factor favors the parties who pioneered the attack on the integration criterion -- they were arguing a case of first impression. Parts two and three under Retail favor the opposing applicants, i.e., reliance by parties on old law and the length of time of such reliance. However, this must be diminished due to the long-standing and widely-held understanding among the communications bar that FCC comparative hearings are highly-speculative litigations to engage in.

Reliance on the vagaries of the Commission's integration decisions, called "mush" by the late Board Member Norman Blumental, is not exactly like reliance on the Rule Against Perpetuities. Part four strongly favors those who have sought the change in the law as it did in the Maxcell decision, i.e., the limited detriment to the opposing parties for whom the result does not consist of deprivation of any right or exposure to any new liability, but merely results in the altered opportunity to secure a federal privilege to which the parties have no right. Part five of the Retail test also strongly favors those who have sought the change in the law, i.e., to award licenses to use the public airwaves to serve the public interest in a rational and meaningful way, rather than in an arbitrary and capricious way.

Respectfully submitted,



Gene A. Bechtel

Bechtel & Cole, Chartered
Suite 250
1901 L Street, N.W.
Washington, D.C. 20036
Telephone 202-833-4190
Telecopier 202-833-3084

July 25, 1994

CERTIFICATE OF SERVICE

I, Gene A. Bechtel, certify that copies of the foregoing COMMENTS OF BECHTEL & COLE, CHARTERED, 25th day of July 1994 being duly served on the following persons either by hand delivery to their office as noted or by mailing in the United States mail, first class, with postage prepaid:

Service by hand delivery:

The Hon. Edward Luton
Suite 225
2000 L Street, N.W.
Washington, D.C. 20554

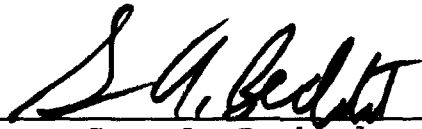
Charles E. Dziedzic, Esq.
Suite 7212
2025 M Street, N.W.
Washington, D.C. 20554

Service by mailing:

Lawrence N. Cohn, Esq.
Cohn and Marks
Suite 600
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Counsel for Innovative Women's Media Association

David E. Honig, Esq.
3636 16th Street, N.W.
Washington, D.C. 20010
Counsel for Port City Communications, Inc.

James J. Freeman, Esq.
Reed, Smith, Shaw & McClay
1200 18th Street, N.W.
Washington, D.C. 20036
Counsel for Caddo Broadcasting Limited Partnership

A handwritten signature in dark ink, appearing to read 'G. A. Bechtel', is written over a horizontal line.

Gene A. Bechtel

CERTIFICATE OF SERVICE

I certify that on this 25th day of July 1994 I am causing copies of the foregoing COMMENTS OF BECHTEL & COLE, CHARTERED, to be served by personal delivery or by first class United States mail, postage prepaid, addressed to the following:

Via Hand Delivery

William E. Kennard, Esq.
General Counsel
Federal Communications Commission
Suite 614, 1919 M Street, N.W.
Washington, D.C. 20554

Via Mails

Barry D. Wood, Esq.
Jones, Waldo, Holbrook &
McDonough, P.C.
Suite 900
2300 M Street, N.W.
Washington, D.C. 20037
Counsel for Galaxy Communications, Inc.

Thomas A. Hart, Jr.
McManimon & Scotland
Suite 500
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Counsel for Anchor Broadcasting
Limited Partnership



Gene A. Bechtel

Certificate of Service

I, Gene A. Bechtel, certify that I am causing copies of the foregoing COMMENTS OF BECHTEL & COLE, CHARTERED, to be served this 25th day of July 1994 on the following individuals:

Via Hand Delivery

The Honorable Joseph A. Marino
Chairman, Review Board
Federal Communications Commission
2000 L Street, N.W. -- Suite 211
Washington, D.C. 20554

The Honorable Marjorie R. Greene
Member, Review Board
2000 L Street, N.W. -- Suite 204
Washington, D.C. 20554

Allan Sacks, Esq.
Chief for Law, Review Board
2000 L Street, N.W. -- Suite 205
Washington, D.C. 20554

Robert Zauner, Esq.
Hearing Branch, Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W. -- Suite 7212
Washington, D.C. 20554

Via Mail

Lawrence J. Bernard, Jr., Esq.
Law Offices of Lawrence J. Bernard, Jr.
2000 L Street, N.W. -- Suite 504
Washington, D.C. 20036-4988
(Counsel for Melanie Bruton)

Ricardo A. del Castillo
Madeline A. del Castillo
Madalina Broadcasting, Inc.
4308 Fannin Drive
Irving, Texas 75038

Kathryn R. Schmeltzer, Esq.
Fisher, Wayland, Cooper & Leader
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006
(Counsel for Prairie Broadcasting, Inc.)

Robert S. Stone, Esquire
McC Campbell & Young
P.O. Box 550
Knoxville, TN 37901
(Counsel for Jonathan and Mary Lyn Wolfert,
a General Partnership)

Harry C. Martin, Esquire
Reddy, Begley & Martin
1001 22nd Street, N.W. -- Suite 350
Washington, D.C. 20037
(Counsel for Poder Broadcasting, Inc.)

J. Jeffrey Craven, Esquire
Besozzi & Gavin
1901 L Street, N.W. -- Suite 200
Washington, D.C. 20036
(Counsel for O'Day Broadcasting, Ltd.)

James A. Gammon, Esquire
Gammon & Grange
8280 Greensboro Drive -- 7th Floor
McLean, VA 22102
(Counsel for Hispanic Coalition, Inc.)


Gene A. Bechtel

CERTIFICATE OF SERVICE

I certify that true copies of the foregoing COMMENTS OF BECHTEL & COLE, CHARTERED, have been served this 25th day of July 1994 by hand delivery or United States mail, first class, postage prepaid, to the offices of the following individuals:

William E. Kennard, Esquire*
General Counsel
Federal Communications Commission
1919 M Street, N.W., Suite 614
Washington, D.C. 20554

William H. Crispin, Esquire
Verner, Liipfert, Bernard, McPherson
& Hand, Chartered
901 15th Street, N.W., 6th Floor
Washington, D.C. 20005
(Counsel for Lowell Maze Jackson)

Gary S. Smithwick, Esq.
Smithwick & Belendiuk, P.C.
1990 M Street, N.W., Suite 510
Washington, D.C. 20036
(Counsel for Ivan M. Miles)

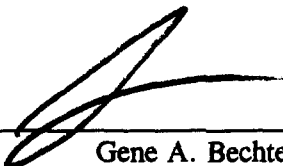
Lewis J. Paper, Esq.
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Washington, D.C. 20005-3919
(Counsel for Johnson Broadcasting, Inc.)

Richard J. Bodorff, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(Counsel for Eathel Holley)

James J. Freeman, Esquire
Reed, Smith, Shaw & McClay
1200 18th Street, N.W.
Washington, D.C. 20036
(Counsel for Mazo Radio Co.)

Jonathan W. Emord, Esquire
Alexander, Cebhardt, Aponte
& Marks
Lee Plaza, Suite 805
8601 Georgia Avenue
Silver Spring, Maryland 20910
(Special counsel for four
joint appellants)

* Denotes hand delivery


Gene A. Bechtel